
BOOK REVIEWS

"A CONSTITUTIONAL HISTORY OF THE UNITED STATES" —
Andrew C. McLaughlin. D. Appleton-Century Co., New York. 1936

It is not a great step from the current controversy waxing torrid about the fundamental law of our land to Professor McLaughlin's Pulitzer Prize-winning volume, *A Constitutional History of the United States*. Hardly any contribution could aid the reader better to think objectively about recent developments, or, if that is impossible, to rearrange his prejudices in the light of past events critically described. Professor McLaughlin has spent the greater part of a lifetime in the study of constitutional origins and change; and this summary exposition presents his most important conclusions in a scientific and catholic spirit and a classic style.

Professor McLaughlin finds the sources of American constitutionalism in the dualistic structure of the old British empire. After the Revolution principles of limited sovereignty were carried forth from the British experience and incorporated in the new American order, inducing a written fundamental law, inescapable by governments, and the federal system.

In their search for criteria by which to question authority of government, James Otis, Samuel Adams, Patrick Henry, and the other firebrands had not far to look. They found their advocate in John Locke, philosophic apologist for the parliamentary party in the Revolution of 1688. He had said, in short:

"The critical question . . . was how it came about that one man, a monarch, or one set of men had been placed above other men with power to issue orders, laws, and decrees; if governmental power was derived, if men voluntarily and by consent had surrendered their *original* equality, then, unquestionably, government was authoritative only when acting within the limits of the compact and when guarding the natural rights of life, liberty, and property. *Before* government was established, men were in a state of equality; *after* government was established they were not; they gave up their equality and subjected themselves to a superior; but this superior must rule for the common good." McLaughlin's *History*, p. 104.

Against governmental excesses there was the right to revolution. What better basis could there be to demand the rights of Englishmen to representation? Even at a time when Old Sarum and other blighted

constituencies fed the House of Commons and the men of Britain defended their position by citing their own poor representation, Locke's words could hardly be nullities to Englishmen so few generations removed from the latter seventeenth century. His writings caught on in America as the Mosaic Law of English constitutionalism. Originally visionary descants, they were accepted as descriptive of *real* natural rights. The persistence of the "compact" philosophy today is a fair indicator of the strength of its origins. When Jeremy Bentham termed natural law "rhetorical nonsense on stilts" he was not voicing the unanimous sentiment of his time or of our own.

British statesmen could announce with unmitigated fervor the supreme and unlimited authority of Parliament, but Americans were unwilling to concede such absolute power to so limited a body. Pleading the cause of the common man, they saw the need of a written document. But the writing alone was not enough. It must be binding. It must be enforced by the courts of law. This particular judicial power rests "plainly on historical forces" rather than on formal logical argument (page 310). "It is the culmination of the essentials of Revolutionary thinking and, indeed, of the thinking of those who a hundred years and more before the Revolution called for a government of laws and not of men" (page 310). The doctrine of "judicial review" arose out of a quest for non-autocratic government. English precedent was found for granting to the "natural rights" concepts the force of law. A fixed constitution superior to legislative authority became more than a precept of optional enforcement and as rigorously binding as a statute. Herein lies a significant distinction between United States and European constitutional law. The Continental constitution is little more than an expression of political philosophy prevalent at the time of its writing. It may be amended by the appropriate legislative body as readily as any statute. The courts abroad enforce the constitution only insofar as the legislature has incorporated it into the statute. In the United States, the Constitution stands as a law, enforceable as such in the courts without the additional prerogative of legislative grant, free from Congressional whim, amendable not by subsequent statute but by specific reference to the people or to the state legislatures as barometers of the popular will.¹

The force of John Marshall in setting limits and in establishing the judicial review as a prerogative of his court is clearly indicated by the fight between Andrew Jackson and the United States Bank. The Supreme Court upheld the Banking Act of 1816. "It is significant that

¹ Another manifestation of the conviction that governmental authorities should be limited and offset is the doctrine of separation of powers. It is the American expression of Montesquieu, who was understood to advocate "checks and balances."

in 1832 men should put forward a judicial decision as conclusive, not only in determining the validity of a measure already passed, but as finally and peremptorily binding on the legislature when a new measure is presented for passage" (page 411).

Professor McLaughlin traces the dialectics of John C. Calhoun with great care. The great Southerner knew that to justify nullification the states must be a mere league of sovereignties. The Constitution must be a contract of such a league, he contended, because sovereignty is indivisible and cannot be surrendered and separate adoption by the states precludes the possibility of establishment of a new entity. The fundamental fallacy, says Professor McLaughlin, lies just there. What is to prevent sovereignties A and B, acting as geographic units, from merging into a common new government, C, if they so desire? If they do so successfully merge, can one still hold it impossible? His issue dead, Calhoun still lives as a symbol of rationalization to reach a conclusion.

It is somewhat comforting to remember that the recognition of the possibility of "packing" the Supreme Court is not a phenomenon of this century. In the intersectional disputes centering about the principles decided in the Dred Scott case northern partisans did not hesitate to charge that a proslavery conspiracy had resulted in a "packed" Court. At that time a point in issue was not so much the unacceptability of the "packing" principle, which was generally conceded, but rather the validity of the denial of Southern protagonists of any such purpose. Republican denunciations of "judicial tyranny" were particularly harsh and widespread between 1857 and 1864. Congress and President Lincoln displayed for Taney's decisions and opinions an almost complete contempt. It must be admitted, however, that the thought and sentiments of the masses were not so deeply affected as today. Lincoln had no radio with outlets in more than twenty million homes and public places.

Out of the Civil War period there arose numerous problems of administration. It is strange that the American Revolution is reflected so faintly in the Constitution on the subject of conduct of war. As a result of the war emergency and this lack of precision the executive position was strengthened by declaring lapses in minor constitutional limitations on the theory of necessity to preserve the essence of the basic law. The pertinence of this fact to modern consideration is in the theoretical possibility that a president may dispose of the "constitutional system," set up a dictatorship, and claim for his precedent in despotism the conduct of Abraham Lincoln. The thing to note, however, is that Lincoln in the rôle of dictator *did not*, with all his power, "purge" Congress, force elections, and quash the attacks of his political opponents

by "military protection".² Not what could be done but what was done was significant then as it is now. The functional force behind the Constitution is derived from the democratic spirit and habits of mind of the governed people. The formulated doctrines without basis in belief would make of the simple document a mockery of an opposed idealism and a sham. The test of the fair interpretation becomes not the fact that a thing was done illegally in that it contravened constitutional definitions but rather that much was not done that might have been in violation of the best judgment of the democratic-minded people.

In his history of the Fourteenth Amendment, Professor McLaughlin makes apparent two principles operative in the establishment of the status of the Supreme Court. First, the power to interpret the due process clause of the Amendment has grown gradually into the power of a discretionary veto upon every state legislature. Second, the exercise of that power depends upon the social philosophy of the judges. Decisions, in increasing measure, deal with legislation in the light of an unpartisan, realistic study of the conditions affected. The courts have had the mandate of the Fourteenth Amendment constantly in mind. They have had to evaluate new regulation of control of individual conduct and individual use of property in a degree of variance with the older ideas. Constitutional law has become acknowledged as a developing science, or at least, as not necessarily bound to conceptions of the eighteenth century. It is distinctly perceptible that the courts have shifted their emphasis from a special regard for individual rights to a fuller appreciation of public needs.

The Supreme Court has had a difficult task. The whole theory of judicial review has been attacked on the ground that the constitutionality of a statute has been conditioned upon whether the particular judges participating in the decision considered the legislation advisable. "Immutable principles of social competence and rectitude cannot be embodied in any series of decisions, however learned they may be" (page 758). It must be remembered, however, that a standard of "reasonableness" allows accommodation to new conditions of society and altered concepts of the essence of liberty. Before one can sweep aside the power of the judges to weigh imponderables of constitutionality, he must be willing to accept more hasty alteration of constitutional principles. This may be more dangerous than the obstruction of reasoned circumspection. It is not at all clear that a rational degree of progress has been impeded by our written Constitution. Whereas many acts have been declared void in recent years, no small number of the laws have had but vague

² See J. G. Randall, "Lincoln in the Rôle of Dictator," *South Atlantic Quarterly*, XXVIII, pp. 236-252, cited by Professor McLaughlin, p. 639.

relation to public good. Many laws have been hastily drawn by legislators without their proper share of appreciation of responsibility in a developing society.

Meriting equal emphasis with definite limitations expressed in recent opinions, is the emergence of all phases of national over state government. The establishment of commissions intrusted with extensive power, generally defined by statutory grant, gave rise to the belief that there was practically no danger of over-delegation of power. Professor McLaughlin, closing his discussion with 1932, does not consider the potential limitations upon the conferring of legislative authority as they have been expressed in the Schechter decision and others. Despite such recent cases the administrative power becomes greater in constantly enlarging fields. Congress drafts bill upon bill expanding national influence into formerly unlegislated zones to meet needs newly apparent or which up to the moment could not be provided for because of a narrower definition of the national sphere in the constitutional system. In this direction the Supreme Court has given broader construction to such phrases as "power to regulate commerce . . . among the several states" and "due process of law." Numerous decisions have established more clearly, and in many cases not too narrowly to foster centralized government, the limits of legislative areas which before had been too conjectural to permit of development of a far-reaching policy.

Expanding with other departments has been the office of the executive. As an initiator and custodian of new bills the President molds legislative policy. His veto and patronage powers are strong forces to induce support. But we need not fear his power. Fascist, Communist, and other state eruptions expressed in the toll of intrigues of leaders famished for fame and power are not likely to threaten seriously our system so long as it meets the general standards of orderly popular government, adequately efficient. Legislative blindness, obstructionism, indefinite and nonassignable responsibility, incoherent and self-destructive party policies, oppression of minority interests — these constitute the real dangers operative through a changed philosophy of government.

The two-party system, which emerged in our country by a political quirk rather than by deliberate provision, has been notably superior to the multi-party counterpart in European governments. Unethical as our parties at times appear to be, it must be conceded that each has been strong enough to activate the other. An important element of our system which is achieved by minority representation of whatever type is legislative concession. Even though a minority cannot pass a bill it may joust the majority into a modified position and thus aid its cause. Our

government has not suffered the disastrous inability of European governments to fix authority with a distinct majority. The multi-party systems have experienced a ruling plurality at odds with an antagonistic majority. In our system the brunt of the legislative burden is borne by the majority which is the plurality. How accountable his party is held for its legislative acts every Congressman knows all too well.

Institutionalists are likely to feel that so great stress on the state is an undue delimitation of the field of constitutional history. After all, it is urged, the sociological structure is constituted of many institutions of which the state is merely an important one. Commercial, cultural, scientific, religious, and scholastic organizations have their juridical constituents. Constitutional history should comprise the whole province. Professor McLaughlin, a constitutionalist, concludes that through the rise and fall of the other systems elsewhere "the American constitutional system still stands." (Page 794) The question it seems necessary to ask is just *what* American constitutional system he refers to as the one that "still stands." Conceding him, however, the limits of his approach, he has discerned definite patterns of continuity in the emergence of the democratic state that render present fact situations relative. Within the scope of its purpose this makes good history.

LEO STONE

"LAWYER LINCOLN"—*Albert A. Woldman. Houghton-Mifflin Co., Boston and New York, 1936. \$3.50*

One hundred years ago, the name of a former backwoodsman, storekeeper, and deputy surveyor was formally enrolled as "the Hon. A. Lincoln, Esquire, Attorney and Counsellor at Law," licensed to practice law in all the courts of the State of Illinois. In commemoration of this centennial, Albert A. Woldman of the Cleveland Bar has written this book dealing with the immortal Emancipator's career as a lawyer and with the legal and constitutional problems which confronted him as Civil War President.

The author has made this timely addition to the vast store of Lincolniana because he believes that Lincoln is the law profession's noblest contribution to American civilization and that, without his twenty-three years of experience at the bar, he might never have become President of the United States. Unfortunately, the influence of the first belief has prevented Mr. Woldman from completely accomplishing his express purpose of producing a realistic picture of Lincoln which would be free from the obscuring cloak of hero-worship. While the